BEFORE THE

FEDERAL TRADE COMMISSION

COMMENTS OF

XANGO, LLC

ON THE

NOTICE OF PROPOSED RULEMAKING

FOR THE BUSINESS OPPORTUNITY RULE

Business Opportunity Rule, R511993

July 12th, 2006

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I. Introduction & Background

XanGo, LLC, is grateful for the opportunity to address the FTC regarding its Notice of Proposed Rulemaking for the Business Opportunity Rule, published in the Federal Register on April 12, 2006. XanGo understands the valuable role the FTC plays in regulating business activity and preventing business fraud, and XanGo supports the FTC's efforts to that end. As a direct selling company, XanGo is very concerned about the activity of fraudulent business operating under the guise of legitimate direct selling companies, and XanGo joins with the FTC in opposing such activity. The purpose of this comment is to help the FTC fully understand the ramifications of this proposed rule to legitimate direct selling companies, and to offer suggestions on how the FTC can better tailor the proposed rule to accomplish its goal of protecting consumers against fraudulent direct sellers while minimizing the negative impact on legitimate direct sellers.

XanGo is a privately held Utah limited liability company started in October 2002. Headquartered in Lehi, Utah, XanGo currently has nearly 600 employees. XanGo operates under the direct sales business model, and thus utilizes independent distributors as its sales force. There are roughly 500,000 XanGo™ Independent Distributors worldwide. XanGo currently markets only one product, a mangosteen dietary supplement called XanGo™ Juice. Mangosteen is a small, purplish fruit native to Southeast Asia, with a Latin name of Garcinia Mangostana. Outside of XanGo Juice production, XanGo's main service is to provide marketing and business support for its distributors. XanGo is an active member of the Direct Selling Association (DSA) and holds itself, as well as its distributor force, to the DSA's code of ethics.

XanGo gives five to seven percent of its net profits to charity, particularly Operation Kids, which is an umbrella charity that funds: Operation Smile, Best Buddies, National McGruff House, COTA (Children's Organ Transplant Association), Steve Young's Forever Young Foundation, Christmas Box House International, and Right to Play. Additional charities we donate to include: Hope Alliance, UMED (University of Utah charity), and other individual projects. XanGo's charitable commitment was a part of the company since conception, and truly reflects who we are.

II. XanGo's Interest in Eliminating Business Opportunity Fraud

As a legitimate multi-level marketing company, XanGo fully supports the elimination of business opportunity fraud. As a commitment to customer satisfaction, XanGo offers a 100% satisfaction guarantee refund policy. The policy reads:

> All Distributors have thirty (30) days to return the Initial Order purchase under XanGo's 100% satisfaction guarantee. XanGo will refund the net purchase price and applicable tax amount less shipping charges. Initial Orders of two (2) cases or less do not need to be returned to XanGo. All Product in excess of two (2) cases must be returned in resalable condition to XanGo in order to receive the refund. A 100% refund will be given on all returned cases included in the Initial Order. In order to receive this refund, the Distributor must contact XanGo within thirty (30) days of

> receiving the Initial Order to inform XanGo of the return. Returned Product must be sent through a form of delivery that can be traced (e.g. UPS) and must be received within seven (7) days of contacting XanGo. Upon receipt, the return will be noted and a refund will be issued to the Distributor within thirty (30) days. Any additional orders made within thirty (30) days of the Date of Sign-up will be subject to all standard return Policies. This Initial Order guarantee also applies to Customers who purchase Product directly from XanGo.

After the initial purchase, XanGo's policy is to refund 90% of all subsequent orders. Additionally, XanGo also has a distributor kit return policy:

> Subject to the restrictions included herein, any distributor kit, opened or unopened, may be returned within thirty (30) days of the shipping date for a full refund, minus shipping costs.

The initial investment to become an Independent XanGo Distributor is $35 (the cost of the distributor kit). Thus, in addition to an almost insignificant up-front investment cost, a prospective purchaser assumes virtually no risk because of XanGo's 100% refund policy on the initial product and distributor kit.

Furthermore, as a member of the Direct Selling Association (DSA), XanGo meets or exceeds the DSA code of ethics. XanGo is fully committed to the following ethical standards as set forth in the DSA code of ethics:

> No member company of the Association shall engage in any deceptive, unlawful or unethical consumer or recruiting practice. Member companies shall ensure that no statements, promises or testimonials are made which are likely to mislead consumers or prospective salespeople.
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> The offer of products or services for sale by member companies of the Association shall be accurate and truthful as to price, grade, quality, make, value, performance, quantity, currency of model and availability. A consumer's order for products and services shall be fulfilled in a timely manner.
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> No member company shall misrepresent the actual or potential sales or earnings of its independent salespeople. Any earnings or sales representations that are made by member companies shall be based on documented facts.

Not only does XanGo hold to these principles, but it imposes, and enforces, these same principles upon its distributor base.

III. Practical Effect of the Proposed Rule on XanGo and its Distributors

While Xango joins with the FTC in its goal to protect consumers and eliminate business opportunity fraud, the unfortunate effect of the additional regulations imposed by the proposed rule is to burden legitimate businesses, while having very little effect on fraudulent activity. There are numerous existing state and federal laws to protect consumers and eliminate fraud. These current regulations need better enforcement; additional regulation is not the answer. A fraudulent business will not be deterred by disclosures, which it can easily falsify. The seven-day waiting period is only effective to the extent a fraudulent business gives true references. Bogus references directing prospective purchasers to individuals complicit in the fraud will not be a deterrent.

A. Reinstatement of a minimum investment threshold.

Speaking on the Franchise Rule, in the Statement of Basis and Purpose, the Commission has noted, "[w]here a franchisee makes no significant investment in the franchise business, he assumes only a limited risk, and the protection of the rule is inappropriate."[1] The rationale behind the threshold limit of the Franchise Rule has not disappeared. When the required investment to purchase a business opportunity is comparatively small, prospective purchasers face a relatively small financial risk. In such circumstances, compliance costs can often outweigh the benefits of pre-sale disclosures and mandatory waiting periods. By capturing all business opportunity sellers, many of which, like XanGo, require a minimal start-up cost, under this proposed rule the FTC is imposing compliance costs that will far outweigh the risks assumed by prospective purchasers.

The statement by attorney Kat Tidd, as quoted in the Supplemental Information on the proposed rule, is instructive on this point: "From my experience as a franchise attorney of more than 15 years, many entrepreneurs will choose to risk not complying with the Rule because the cost of compliance is too high relative to the size of the company, the size of the investment to be made and/or the number of, or profits to be derived from, the sale of opportunities." It would truly be unfortunate if all the rule were to accomplish were to force legitimate direct sellers to risk noncompliance with additional burdensome regulations rather than to achieve its noble purpose of eliminating consumer fraud. The FTC should consider retaining a minimum threshold amount, even if it is a reduced amount, before the disclosure provisions of the proposed rule apply.

B. The seven day waiting period.

While well-intentioned, the seven day waiting period is an unnecessary burden on legitimate direct sellers. From a protection standpoint, such a lengthy waiting period is not commensurate with the risk assumed by prospective purchasers when the start-up costs are minimal. Such a lengthy waiting period is certainly appropriate for large investments, but the FTC should tailor the period to cover only business opportunities that present a significant financial risk to a prospective purchaser. When the investment is only $35, as is the case for XanGo, any waiting period is an unreasonable burden to

[1] 16 CFR at 436.2(a)(2) and (a)(3)(iii).

impose upon distributors, many of whom present the business opportunity while on the road.

As a practical matter, the waiting period will certainly inconvenience enthusiastic individuals anxious to participate in the business opportunity of their choosing. Many willing purchasers contacted on the road will never be re-contacted due to the burdensome requirement of gathering references near the prospective purchaser, providing them with the disclosures, and then following up after seven days—all of which will have to occur long-distance. This burden will be further exacerbated if the prospective purchaser lacks a fax machine or internet service.

A seven-day waiting period also creates an unjustified air of suspicion among prospective purchasers. This waiting period suggests a level of risk that simply doesn't exist for direct sellers, such a XanGo, that present a minimal financial risk to prospective purchasers. Many direct sellers, like XanGo, require a very minimal up-front financial investment and have generous product buyback policies, all of which remove any financial risk to a prospective purchaser.

C. References.

Legitimate direct selling companies have nothing to fear from providing a list of references; indeed, many concerns and fears of prospective purchasers would be alleviated by contacting references. However, this requirement is problematic for a number of reasons. First, all direct sellers universally hold their list of distributors as confidential, proprietary information, akin to a trade secret. Forcing the disclosure of ten distributors to anyone interested in the business opportunity violates the contractual privacy agreements between the company and its distributors, as well as opening those distributors up to being contacted by competitors, other companies' recruiting activities, and solicitors in general.

Second, the reference requirement, when coupled with the seven-day waiting period, poses an enormous burden on distributors who recruit on the road. It is impossible for a distributor to know who might attend a meeting and where that person resides before a meeting takes place, so therefore, they will have to wait until a later time to collect and provide the required disclosure information. The gathering of the ten nearest references will further prolong the seven-day waiting period. Again, such burdensome measures are simply not necessary for direct sellers that offer minimal-risk business opportunities.

Third, the required disclosure of references will not be a significant deterrent to fraudulent activity. A business intent on defrauding its purchasers can easily falsify references and direct prospective purchasers to individuals complicit in the fraud.

Fourth, the requirement that contact information can be given to anyone will certainly discourage participation in the direct selling industry. Many prospective purchasers will be nervous about the idea of their personal contact information being made available to anyone and everyone without their consent. Thus, rather than preventing fraud, this requirement will simply hurt legitimate businesses.

XanGo requests that the FTC modify this requirement by looking into ways that a company can post references of people willing to be contacted, regardless of the nature of their experience with the business opportunity, to supplant the current requirement.

D. Earnings claims.

XanGo strongly supports the regulation that all earnings claims are fully substantiated prior to the claim being made. XanGo currently requires this of itself, as well as our distributors. Furthermore, the substantiation behind earning claims should be made available to any prospective purchaser prior to the decision to purchase the business opportunity.

There are several troubling elements associated with this requirement, however. One, the definition of an earnings claim is extremely broad, even to encompass the photograph of a car. It will be impossible for the average distributor to describe the characteristics of purchasers who have achieved earnings, when those earning are only generally implied. The FTC should consider narrowing the definition of an "earnings claim" so that when made, proper substantiation can be provided to prospective purchasers. If other types of claims are made, they should fall outside this disclosure requirement if accompanied by an appropriate disclaimer.

Two, given the amount of statistical data that is required to substantiate an earnings claim, potentially complex compilations of statistical matrices, including time periods, demographic data, and earnings claims, would be required of distributors. Such complicated compilations will only serve to confuse prospective purchasers. The proposed rule should allow for greater flexibility in the statistical data required to support an earnings claim, while still requiring that all earnings claims are accurate and not misleading.

Lastly, this requirement will do little to deter fraud given the ease with which a fraudulent company could concoct statistical data to support its earning claims. Only those legitimate businesses bearing the heavy administrative costs of compliance will provide accurate data.

E. Cancellation/Refunds

Given the part-time nature of distributors in direct selling companies, distributors often cancel their distributorship for a variety of reasons besides dissatisfaction with the product or business opportunity. They have achieved a specific financial goal, they had a limited need for a product that has been satisfied, or they simply don't have time to work the business. In short, distributors cancel for a variety of reasons that have no bearing on the legitimacy and workability of the business opportunity. Yet the statistics required by this rule, in their raw form, will be as misleading as they are uninformative. The FTC should consider removing this statistical requirement from the disclosure form.

F. Legal actions

The proposed rule requires that distributors disclose all legal actions, regardless of the outcome, concerning "misrepresentation, fraud, securities law violations, or unfair or deceptive practices" during the previous ten years. This requirement, if narrowly tailored to disclose those legal actions going to the business opportunity aspect of the business, would be appropriate. However, as written, the rule not only would require disclosure of litigation potentially unrelated to the business opportunity transaction, but it doesn't provide for disclosure of the outcome of the litigation. Thus, litigation that was favorably resolved for the distributor or direct selling company, or is otherwise irrelevant to the recipient of the disclosures, would still need to be provided. At the very least this requirement should be modified to take into account these problematic elements.

Taken together, these additional requirements will have a significant impact on the number of business opportunities sold by XanGo and all other direct selling companies. While unquantifiable at this time, the cost to XanGo alone could possibly be in the millions of dollars a year. Just in Utah, where XanGo is headquartered, multi-level marketers constitute a $4 billion dollar industry. This industry employs over 4,600 Utahans, provides additional income to more than 90,000 Utah distributors, and pays millions in annual taxes. Additionally, many companies in this industry give heavily to charity. The state- and nation-wide impact this proposed rule will have is incalculable, yet certainly devastating.

IV. Summary & Request for Hearings or Workshops

With the FTC, XanGo feels strongly that fraudulent business opportunities should be eliminated. Such fraudulent activities only erode consumer perception of the direct selling business model as a legitimate way to do business. Xango supports business opportunity regulation that is appropriately tailored to eliminating business opportunity fraud and protecting consumers, while not unduly burdening the activities of legitimate business opportunities. In its current form, the proposed rule unduly impacts legitimate direct selling companies that would otherwise fall outside of the Franchise Rule because of the minimal up-front financial investment required.

XanGo formally requests that the FTC hold workshops in order to fully identify the ramifications of the proposed rule and explore alternative requirements that will be less burdensome to legitimate direct sellers while better deterring fraud. XanGo reserves its right to request a hearing. Thank you for your consideration of the comments and concerns expressed herein.